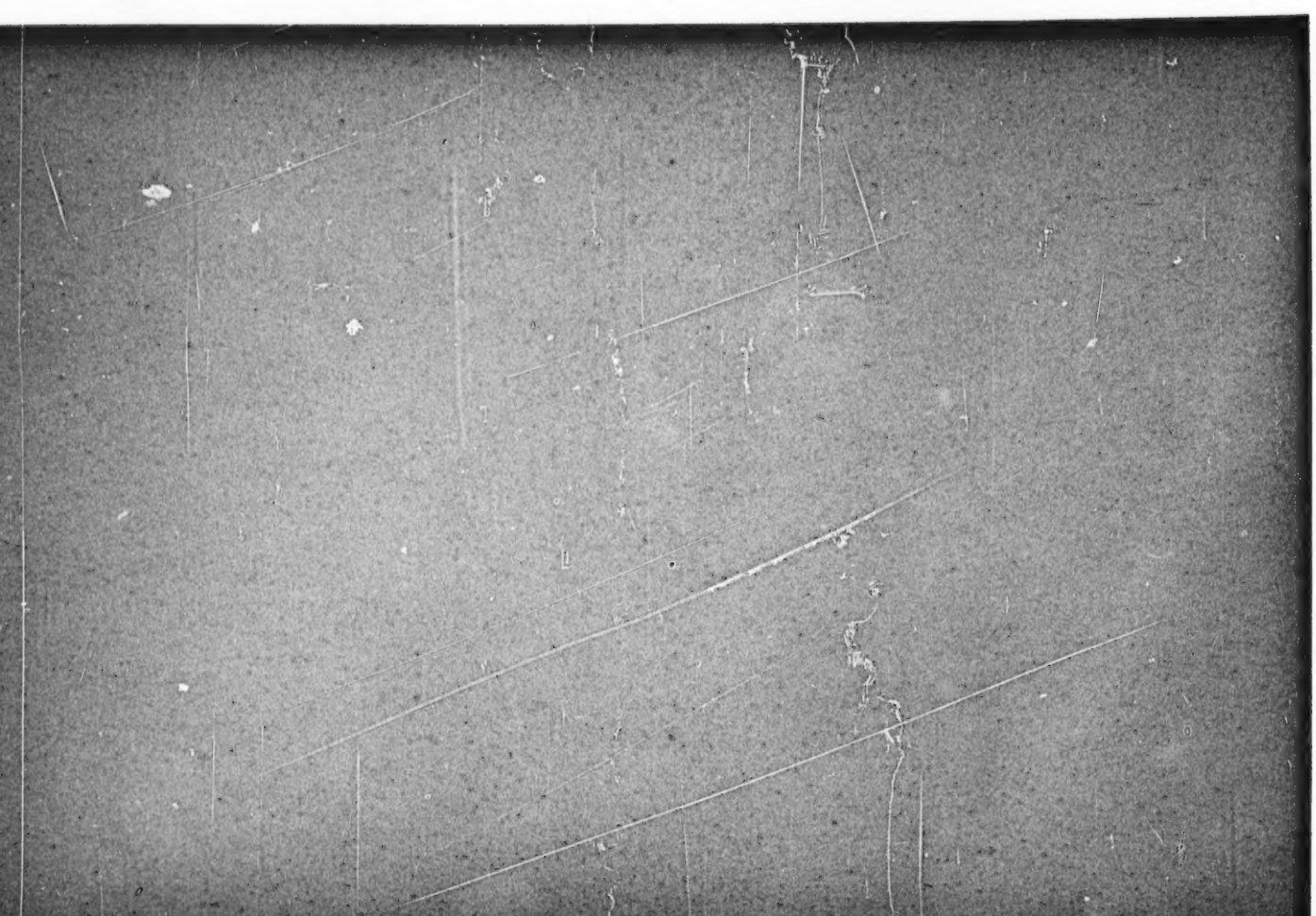
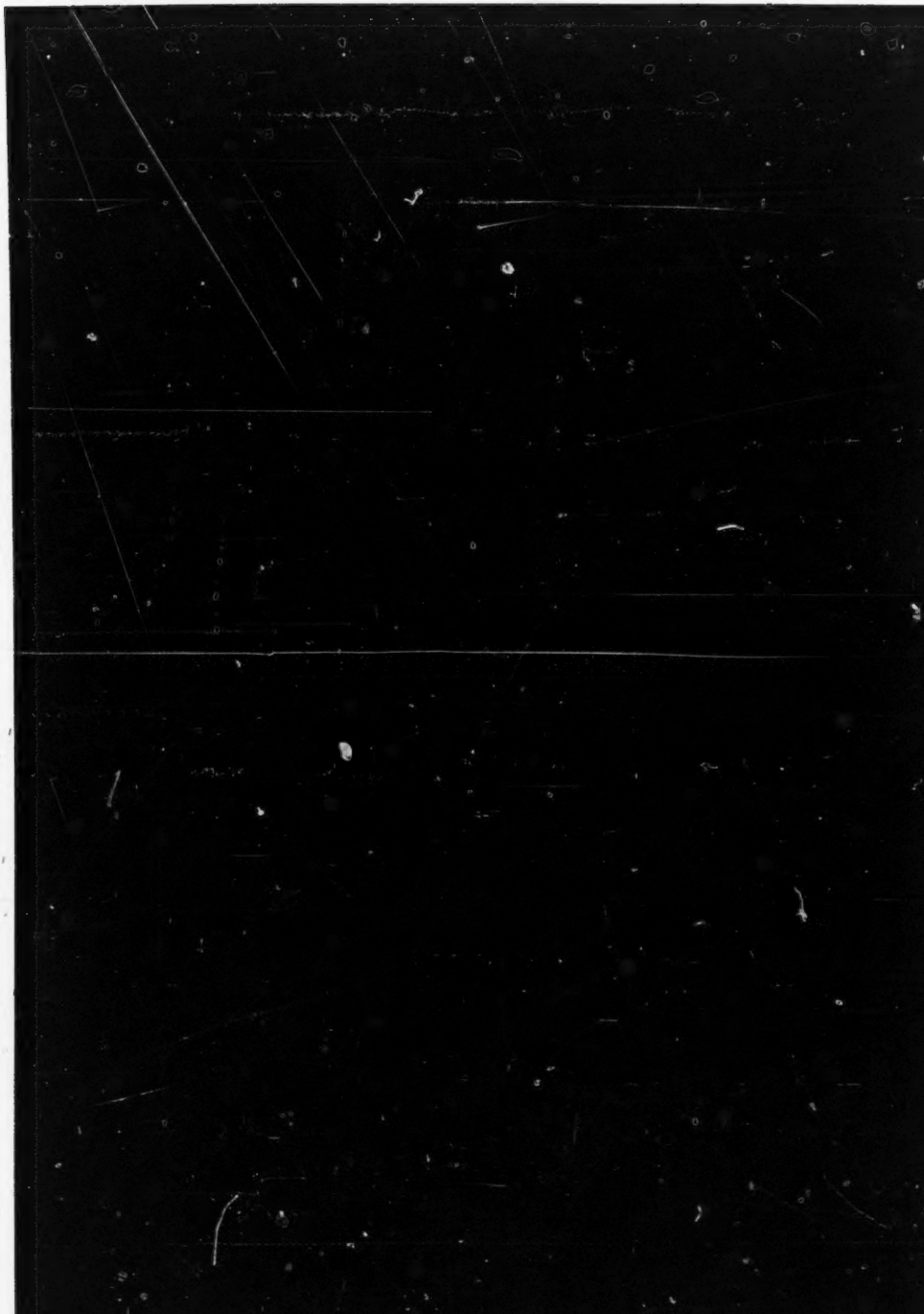






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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1509

PHILIP ABRAMO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1527

FRANK D'AMATO AND RICHARD ZITO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were denied a fair trial because the district court refused to compel the government to reveal the identity of a paid informer; because the government failed to establish the existence of a conspiracy; because the court of appeals reduced the government's standard of proof below proper evidentiary and constitutional standards; and because one of the jurors was claustrophobic.

Petitioners were each charged in a two-count indictment with conspiracy to possess and distribute heroin, in violation of 21 U.S.C. 846, and with the possession and distribution of 487.27 grams of heroin, in violation of 21 U.S.C. 812, 841(a)(1), and 841(b)(1)(A). Following a jury trial in the United States District Court for the Southern District of New York, each of the petitioners was convicted on the conspiracy count. Petitioner D'Amato was also convicted on the possession and distribution count which was dismissed as to petitioner Abramo. The jury was unable to reach a verdict on this latter count as to petitioner Zito. The court sentenced petitioner Abramo to seven years' imprisonment and a fine of $15,000, petitioner Zito to five years' imprisonment and a $10,000 fine, and petitioner D'Amato to concurrent terms of eight years' imprisonment and fines totaling $50,000. The court of appeals affirmed (Pet. App. A).

The facts in this case are fully set out in the opinion of the court of appeals (Abramo Pet. App. A 3a-6a). Briefly, they show that on January 31, 1973, Special Agent Eugene McElroy of the Bureau of Narcotics and Dangerous Drugs (BNDD) went to a New York bar with a paid BNDD informant. This informant introduced Agent McElroy to Frank Burdieri[1] who told McElroy that he had connections through which he could obtain heroin. He mentioned petitioner D'Amato as one of his sources. Burdieri was unable to contact any of his sources on that evening but agreed to contact McElroy when he obtained the heroin.

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[1]Burdieri was deceased at the time of trial. Ten days after his arrest and before the other defendants were arrested, Burdieri disappeared. Two weeks later his body was found washed up on Silver Beach in the Bronx. Death was caused by a bullet in the back of the head following a severe beating.

On February 16, 1973, Burdieri offered Agent McElroy half a kilogram of heroin for $13,000. McElroy arranged to meet Burdieri on February 20. Prior to the meeting, McElroy placed $12,900 in marked bills in a plain white envelope, which he then marked for identification. On February 20, Burdieri, McElroy and the BNDD informant met once again. Burdieri required that McElroy "front" *(i.e.,* produce) the money in advance of delivery. He refused to do so, and Burdieri agreed to check with "his people" to determine whether the "front" was necessary. Burdieri then left McElroy's car and signaled a car carrying petitioners D'Amato and Zito to the curb. The three spoke for about ten minutes, after which Burdieri told McElroy that the transaction could take place in the next thirty minutes without the money being fronted. Burdieri was observed thirty-five minutes later walking with a brown paper bag wrapped in a newspaper. He was being followed by an Oldsmobile carrying petitioners D'Amato and Zito. McElroy received the heroin from Burdieri, who asked to be dropped off at a specified place so that he could give "his people" the money right away. Burdieri was dropped off where he requested and was picked up immediately by the same Oldsmobile. The car was followed by federal surveillance agents. Shortly thereafter the agents saw petitioner D'Amato throw from the car the premarked envelope which had contained the money for the heroin purchase. They immediately retrieved it. On February 23, 1973, McElroy, Burdieri and the informant met once again. McElroy elicited from Burdieri that following their last meeting he had immediately given the money to "his people."

On March 26, 1973, McElroy and Burdieri negotiated a further heroin purchase. Burdieri informed McElroy that "his people" normally dealt in four to five kilogram lots

but that he would be able to get McElroy half a kilogram for $12,500. He stated that his source would be the same people who provided the heroin on February 20. The following day McElroy gave Burdieri $28,000 for the purchase of heroin. They drove around while Burdieri counted the money, and then McElroy dropped Burdieri off at 23rd Street and 2nd Avenue, from which point Burdieri was under continuous surveillance. Burdieri went to 36th Street and 3rd Avenue, where he was met by petitioners D'Amato and Abramo. All three entered Abramo's car and shortly thereafter detected the surveillance units. The car, driven by Abramo, attempted to shake the surveillance units. In the ensuing chase Abramo succeeded in losing all but one of the surveilling cars. On March 29, 1973, Burdieri explained to McElroy that he had failed to return two days earlier with the heroin because he was followed to and during his meeting with "his people."

1. Petitioners contend that the district court should have required the government to disclose the identity of its informant[2], because, they assert, only the informant could confirm or contradict Agent McElroy's testimony, since Burdieri was no longer alive at the time of trial. The disclosure of the identity of the government's informer is a matter within the discretion of the trial judge. *United States* v. *Soles,* 482 F. 2d 103, 109 (C.A. 2). In exercising this discretion, he is guided by the test established by this Court in *Roviaro* v. *United States,* 353 U.S. 53, 60-61:

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[2]In the alternative, petitioners assert that the district court should have required the government to produce its informant for an *in camera* inspection by the judge and defense counsel to determine his involvement in the case. The court of appeals found that "On the facts before the district court, there was no need that a hearing be held to probe into what the paid informant might or might not have testified to" (Abramo Pet. App. A 12a-13a).

> Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.

The trial judge rejected petitioners' claim that the informer was "intricately involved" in the transactions in this case, thereby making his disclosure essential. The district court found that the informant did not participate in any critical phase of Burdieri's and McElroy's transactions (Tr. 327). The informant had no contact with petitioners, and his involvement in the case was very limited.[3] This case, in short, is wholly different from the situation in *Roviaro*, where the government informer was the sole participant, other than the accused, in the transaction charged (353 U.S. at 64). In these circumstances, the court of appeals correctly found "no abuse of discretion" in the trial court's ruling (Abramo Pet. App. A 12a).

2. The sufficiency of the evidence to establish the existence of a conspiracy is exhaustively discussed by the court of appeals, on whose opinion we rely. After review of the evidence (Abramo Pet. App. A 3a-6a), the court evaluated its sufficiency as to each of the petitioners. The court held that the sufficiency of the evidence relating to petitioners D'Amato and Zito "cannot be subject to serious doubt" (Abramo Pet. App. A 6a). With reference to petitioner Abramo the court stated: "Assessing the evidence, we cannot say that it is insufficient to establish Abramo's participation by a fair preponderance, once we draw reasonable inferences from it, as the jury was entitled to do" (Abramo Pet. App. A 9a).

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[3]In addition, the court of appeals found that the district court properly took the violent nature of Burdieri's death into consideration in not requiring the government to disclose the identity of its informant (Abramo Pet. App. A 12a).

While there was less evidence in the record relating to petitioner Abramo than to his co-petitioners, the facts did show that Abramo, together with D'Amato, picked up Burdieri after Burdieri told McElroy that he was going to meet his people to purchase heroin. Abramo was observed by the federal surveillance units as the operator of the car carrying D'Amato and Burdieri; Abramo was operating the car during the roundabout chase designed to evade the federal agents. These affirmative acts, taken in conjunction with Burdieri's statements against penal interest to McElroy are, as found by the district court and affirmed by the court of appeals, sufficient to support Abramo's conviction on the conspiracy count.

3. Petitioners erroneously contend that the court of appeals' reliance on its decision in *United States* v. *Geaney*, 417 F. 2d 1116 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States*, 397 U.S. 1028, lowers the standards of proof in conspiracy cases below established evidentiary and constitutional standards. Petitioners misconceive the nature of the court's holding in *Geaney*, which was simply that "* * * [the judge] must satisfy himself of the defendant's participation in a conspiracy on the basis of the non-hearsay evidence." 417 F. 2d at 1120. Thus, in *Geaney* the court held that the trial judge must determine, at the close of the evidence, whether the prosecution has proven participation in the conspiracy "by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances." *Ibid.* The trial judge, since he is not the trier of fact and is considering the issue solely for purposes of determining suffi-

ciency of the evidence for submission to the jury, need not be satisfied beyond a reasonable doubt.[4]

The evidence in this case, exclusive of the Burdieri statements, was, as found by the court of appeals (Abramo Pet. App. A 6a-11a), sufficient to permit the district court to be satisfied of petitioners' participation in the conspiracy. Moreover, the court of appeals found that evidence of petitioners' partici-

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[4]While there appears to be disagreement among the courts of appeals as to the formulation of the standard for admissibility of co-conspirator statements (compare *United States* v. *Morton*, 483 F. 2d 573 (C.A. 8); *United States* v. *Spanos*, 462 F. 2d 1012 (C.A. 9); *United States* v. *Martinez*, 466 F. 2d 679 (C.A. 5), with *United States* v. *Bey*, 437 F. 2d 188 (C.A. 3); *Carbo* v. *United States*, 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953; *United States* v. *Geaney*, *supra*), the present case is not an appropriate vehicle for resolution of this conflict, because the admission of Burdieri's statement against petitioners D'Amato and Zito was proper under the most stringent standard of admissibility, and its admission against petitioner Abramo, even if errorneous, was harmless. The only statement admitted under the co-conspirator exception to the hearsay rule was Burdieri's statement to Agent McElroy that he was going to meet "his people" (Abramo Pet. App. A 9a). This statement was merely cumulative of the independent evidence (*i. e.*, testimony of surveilling agents, Burdieri's "verbal acts" and evidence concerning a prior similar transaction) establishing Abramo's participation in the conspiracy, since that evidence made it entirely clear, wholly apart from the statement, that when Burdieri left the car with the money, he was proceeding to attempt to consummate the narcotics transaction with the other persons involved. The only issue as to which the jury could have had any doubt was whether Abramo was a participant in the conspiracy, and the statement adds little, if anything, to the other evidence bearing on that question.

We also submit, as we did in the court of appeals, that Burdieri's statement was admissible as a "verbal act" probative of intention without regard to the co-conspirator exception to the hearsay rule. See *United States* v. *Annunziato*, 293 F. 2d 373 (C.A. 2), certiorari denied, 368 U.S. 919.

pation in the conspiracy was strengthened when Burdieri's verbal acts —"contemporaneous utterances explaining non-verbal conduct or its tenor"—were considered. The court noted that such "verbal acts" are not hearsay, since they are not introduced to establish the truth of the matter asserted in the statements. Not being hearsay, they may properly be considered in determining whether the *Geaney* test has been satisfied.

Once petitioners' participation was established by a preponderance of evidence independent of hearsay evidence, Burdieri's statements were admissible against petitioners under the co-conspirator exception to the hearsay rule. See, *e.g., Wong Sun* v. *United States,* 371 U.S. 471, 490; Developments in the Law, *Criminal Conspiracy, 72 Harv. L. Rev. 920, 922-923 (1959).*

Petitioners contend, however, that the admission of Burdieri's statements constituted error under this Court's decision in *California* v. *Green,* 399 U.S. 149, and *Dutton* v. *Evans*, 400 U.S. 74. To the extent that petitioners contend that the co-conspirator exception to the hearsay rule is invalid, such a contention finds no support in either *Green* or *Dutton.* Indeed, in *Dutton* this Court expressly stated that it did not question the validity of the co-conspirator exception to the hearsay rule (400 U.S. at 80). Petitioners' invocation of the Confrontation Clause of the Sixth Amendment is equally unavailing. Although admissibility under the hearsay rules is not conclusively determinative of a claim under the Confrontation Clause, this Court has noted that the two "stem from the same roots" (400 U.S. at 86). The policies underlying the hearsay rules are relevant to the Confrontation Clause inquiry. In the present case,

the admissibility of those co-conspirator statements is strengthened by the fact that Burdieri's statements were declarations against his own penal interest. In *Dutton* this Court recognized that such declarations reflect one of the "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." 400 U.S. at 89.

4. Petitioners' final contention is that they were denied a fair trial because one of the jurors was claustrophobic. In considering this contention, the court of appeals correctly found (Abramo Pet. App. A 12a):

> After verdicts had been returned as to all appellants on all counts except with respect to Zito on count two, it was determined by the court that one of the jurors was unable to continue. The juror had in fact previously experienced some discomfort, and indeed had been sent to a hospital where the problem was diagnosed as an acute attack of claustrophobia. The court had, however, taken steps to alleviate the the strain on the juror; and when the point was reached that the juror could not continue further, a full and most careful examination of that juror and the jury by the court, App. 735a-68a, made it abundantly clear that the claustrophobia had not "adversely affected the challenged juror's ability to decide [the] case intelligently." *United States* v. *Silverman,* 449 F. 2d 1341, 1344 (2d Cir. 1971, *cert. denied*, 405 U.S. 918 (1972)), at least with respect to the verdicts already returned. There was therefore no prejudice to any defendants on those counts. Appellant Zito argues on appeal, citing no authority, that the failure of the jury to return a

verdict as to him on count two required dismissal of that count rather than a mistrial as directed by the court below. But appellant Abramo's brief correctly states the law, which is that a new trial—following the declaration of a mistrial—is the appropriate outcome where a juror has been disqualified. See *Parker* v. *Rattenni*, 480 F. 2d 195 (2d Cir. 1973).

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.